Prepared Remarks of Congressman Robert C. "Bobby" Scott
U.S. House of Representatives
Judiciary Committee Markup of
H.R. 2389, the Pledge Protection Act of 2005
Wednesday, June 7, 2006
Washington, DC

Mr. Chairman, any time we consider legislation like this, one can assume that veterans' benefits have just been cut or are about to be cut. Just a couple of weeks ago, we rejected the Congressional Black Caucus' budget and instead adopted a budget with $300 billion more in deficit spending; the Congressional Black Caucus found $20 billion more for veterans' benefits than the budget we adopted. If we are going to deal with patriotic issues, I would think we would fix veterans benefits and not divert attention away from pressing matters with things like this bill.

But instead of veterans' benefits, today we are going to consider this bill. And just for the record, regardless of what the Court might decide, I happen to agree with the dissent in *Newdow v. U.S. Congress*, the Ninth Circuit case regarding the Pledge of Allegiance, which I believe accurately surmised—and, I quote: "Legal world abstractions and ruminations aside, when all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress someone's belief is so minuscule as to be *de minimis*. The danger that phrase represents to our first amendment's freedoms is picayune at best."

And so, Mr. Chairman, as we discuss the constitutionality of "under God" in the Pledge, we must recognize that every bill that is introduced, every hearing we have, and every vote we take on this issue only serves to chip away at the *de minimis* argument and increase the chance that the courts will ultimately decide that it is unconstitutional.

The simple fact is that we need to respect the Constitution and the right of courts to decide whether the Pledge is constitutional of not, but the majority will not do that. H.R. 2389 is a court-stripping bill plain and simple, as the bill does not address the substance of arguments pro and con, but prohibits federal courts from deciding the case.

I find it ironic that just last week, members of this very committee expressed outrage that the Executive branch would tread on our independence and our ability to do our job as a coequal branch of government, when now this very committee shows no apparent qualms about turning around and preventing the Judicial branch from doing its job. The foundation of our democracy rests on the checks and balances of power among three coequal branches, and this bill is a flagrant disregard for that principle. In addition, this bill will result in unprecedented confusion as each State decides how to interpret the Federal Constitution. It also sets a poor precedent that any time we are considering a bill that might be found unconstitutional by the courts, we will just prohibit the courts from saying so by taking away their right to hear the case.

Mr. Chairman, this bill would strip the courts of their ability to hear cases that are clearly within federal jurisdiction because those cases address fundamental constitutional rights and individual liberties guaranteed under the Bill of Rights. And many rights may be involved, because this bill is not limited to cases addressing the words "under God." The recitation of the Pledge may, in some circumstances, implicate the right to free speech, the right to freedom of association, the right to free exercise of religion, and Establishment Clause protections, all guaranteed under the First Amendment to the Constitution.

The need for these protections and federal jurisdiction over these issues is not speculative. For example, even before "under God" was in the Pledge, the Supreme Court in 1943 held in *West Virginia Board of Education v. Barnett*e that a compulsory flag salute and accompanying pledge were unconstitutional. For 203 years, since *Marbury v. Madison* in 1803, the Supreme Court has been the final arbiter of what is constitutional and what is not.

And so while Congress has the power to regulate jurisdiction of federal courts, the court-stripping language in H.R. 2389 grossly exceeds that power in violation of basic principles of separation of powers. If this court stripping idea had been around in 1954, Congress could have prohibited the Supreme Court from hearing issues involving student assignment to public schools, and we never would have had the decision in *Brown v. Board of Education*. Or it could have been passed in legislation in the 1960s, and the decision of the federal court in *Loving v. Virginia* to overrule the will of the people of Virginia and require Virginia to recognize racially mixed marriage might never have happened. In both cases, the judges who made those decisions were considered to be the same rogue, unelected, lifetime-appointed, activist judges that many judges are being accused of today.

The truth is that we rely on the federal courts to determine and enforce our constitutional rights. America is more politically and religiously diverse than it was in 1943, but instead of embracing that diversity, the majority would take away our fundamental rights.

We should instead adhere to the wisdom of the Supreme Court in the *Barnette* case when it said, and I quote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Mr. Chairman, I ask unanimous consent to insert into the record letters from many legal and civil rights organizations that are opposed to the bill, and I urge my colleagues to oppose the bill.